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In the Supreme Court of the United States

OCTOBER TERM, 1985

MODINE MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's metal finishing pretreatment standards, which did not include a provision for variances, were contrary to prior decisions of this Court.

2. Whether the court of appeals' decision not to extend the compliance deadline for the metal finishing pretreatment standards was contrary to prior decisions of this Court.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Paper Institute v. *Train*, 543 F.2d 328, cert. dismissed, 429 U.S. 967 4

Chemical Manufacturers Ass'n v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985) 2, 3, 5, 6, 7, 8, 9

E.I duPont deNemours & Co. v. *Train*, 430 U.S. 112 .... 2, 7, 9

EPA v. *National Crushed Stone Ass'n*, 449 U.S. 64 ..... 4, 7-8

General Motors Corp. v. *EPA*, 738 F.2d 97 ..... 3, 11

National Association of Metal Finishers v. *EPA*, 719 F.2d 624, rev'd *sub nom. Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985) 3, 5, 8

Natural Resources Defense Council, Inc. v. *EPA*, 656 F.2d 768 11

Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 10-11

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 553(e) 6

Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.* 1

33 U.S.C. 1311(*l*) (§ 301(*l*)) 5, 8

33 U.S.C. 1311(b)(1)(A) 2

33 U.S.C. 1311(b)(2)(A) 2

33 U.S.C. 1311(b)(2)(C) 2

33 U.S.C. 1317(b) 2

Statutes and regulation – Continued: Page

40 C.F.R.:
Pt. 403:
Section 403.13 ..... 3, 4
Section 403.13(g)(2) 4
Pt. 413 ..... 3, 4
Pt. 433 4
Section 433.15(a) 4

Miscellaneous:

46 Fed. Reg. 9462 (1981) 3
48 Fed. Reg. (1983):
p. 32462 ..... 3, 4
p. 52396 5
49 Fed. Reg. 5131 (1984) 5
50 Fed. Reg. (1985):
p. 38809 6
p. 38810 7

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OPINION BELOW

The court of appeals entered a judgment order without opinion (Pet. App. A1).

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1985. The petition for a writ of certiorari was filed on August 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, requires the Administrator of the United States Environmental Protection Agency (EPA) to regulate two types of industrial facilities: (1) "direct" dischargers, *i.e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i.e.*, facilities that discharge

waste water into publicly owned treatment works (POTWs) prior to discharge into navigable waters. For both types of dischargers, EPA conducts notice-and-comment rulemaking proceedings and promulgates nationwide, technology-based requirements applicable to categories of dischargers (*e.g.*, iron and steel, metal finishing, and leather tanning). See *E.I. duPont deNemours & Co.* v. *Train (duPont)*, 430 U.S. 112 (1977); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc. (CMA)*, No. 83-1013 (Feb. 27, 1985).

For direct dischargers, the Act required that limitations be established in a two-phase program; dischargers were required to comply with best practicable control technology currently available (BPT) by July 1, 1977 (33 U.S.C. 1311(b)(1)(A)) and were required subsequently to comply with the more stringent best available technology economically achievable (BAT) (33 U.S.C. 1311(b)(2)(A) and (C)). Indirect dischargers are subject to pretreatment standards applicable to pollutants that are not susceptible to treatment by or that would interfere with the operation of POTWs. These standards must be complied with within three years of their promulgation as specified by the Administrator. 33 U.S.C. 1317(b).

The categorical pretreatment standards at issue in this case are those applicable to indirect dischargers in the metal finishing industry. EPA has established these categorical pretreatment standards under the same two-phase approach used for direct dischargers.

2. In each rulemaking proceeding, EPA gathers as much data as possible regarding facilities in the particular category. Nationwide requirements for all plants in that category are based on these data. On occasion, however, the Agency may be unaware of or may not consider a factor that is applicable to a few plants and that would dictate a change in the requirements applicable to those facilities. EPA therefore developed a regulatory mechanism by which the national requirements may be adjusted, on a

case-by-case basis, to better suit those few atypical plants. This vehicle, known as the "fundamentally different factors" (FDF) variance, was examined by the Court last Term in *CMA*. As its name suggests, this mechanism allows variances for existing dischargers that can demonstrate that their situation is characterized by factors that are "fundamentally different" from those considered by EPA in developing the national rule for their category. In effect, the FDF variance creates a new subcategory for the discharger in question based on factors that would have justified—and indeed required—the creation of that subcategory had EPA been aware of those factors or taken them into account during the national rulemaking process.

The FDF variance procedures for indirect dischargers are codified in EPA's general pretreatment regulations. 40 C.F.R. 403.13 (Pet. App. A48).

3. On July 15, 1983, EPA promulgated the categorical pretreatment standards for the metal finishing industry. 48 Fed. Reg. 32462 (Pet. App. A3-42). The metal finishing pretreatment standards are the equivalent of the more stringent "BAT" effluent limitations guidelines applicable to direct dischargers.[1] Those pretreatment standards

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[1] EPA promulgated categorical pretreatment standards for electroplating sources in the metal finishing industry on January 28, 1981. 46 Fed. Reg. 9462; 40 C.F.R. Pt. 413. Those standards are the equivalent of the "BPT" effluent limitations guidelines applicable to direct dischargers. The electroplating standards were upheld in *National Association of Metal Finishers (NAMF)* v. *EPA*, 719 F.2d 624 (3d Cir. 1983), rev'd on other grounds *sub nom. Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985). The metal finishing industry, including Modine's facilities, was required to comply with the electroplating categorical pretreatment standards by June 30, 1984. Several industrial companies petitioned EPA to extend this compliance deadline. EPA denied this petition, and the court of appeals upheld the Agency's decision. *General Motors Corp.* v. *EPA*, 738 F.2d 97 (3d Cir. 1984).

require approximately 7,500 metal finishers to comply with numerical limitations on toxic metals, organics, and cyanide discharged in their waste water. The toxic metal pretreatment standards must be complied with by February 15, 1986. 48 Fed. Reg. 32462 (1983) (Pet. App. A4).[2]

Like other categorical pretreatment standards, the metal finishing pretreatment standards contain a provision (40 C.F.R. 433.15(a)) authorizing FDF variances pursuant to the general pretreatment regulations (40 C.F.R. 403.13). The general pretreatment regulations require that an application for an FDF variance generally must be filed within 180 days after the effective date of the categorical pretreatment standard (40 C.F.R. 403.13(g)(2)). The effective date of the metal finishing pretreatment standards was August 29, 1983.

4. Prior to promulgation of the metal finishing standards, numerous parties petitioned the United States Court of Appeals for the Third Circuit to review various aspects of the Agency's general pretreatment regulations and the electroplating categorical pretreatment standards. On September 20, 1983, the court of appeals upheld the electroplating pretreatment standards in their entirety but remanded several aspects of the general pretreatment regulations. Of particular relevance to this case, the court

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[2] The metal finishing pretreatment standards apply to a larger number of waste streams than the electroplating pretreatment standards and impose somewhat more stringent limitations. Compare 40 C.F.R. Pt. 413 with Pt. 433. Both standards, however, are based on the use of the same treatment technology—precipitation and clarification—which is widely used in the metal finishing industry. The more stringent metal finishing standards reflect the additional data gathered by the Agency and represent the "BAT" standard of the "best" treatment technology performance in the industrial category. *American Paper Institute* v. *Train*, 543 F.2d 328, 346 (D.C. Cir.), cert. dismissed, 429 U.S. 967 (1976). The electroplating standards represent the "BPT" standard of the "average of the best" treatment technology performance in the industrial category. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 76 n.15 (1980).

of appeals remanded the FDF variance provision, holding that Section 301(*l*) of the Clean Water Act, 33 U.S.C. 1311(*l*), prohibits FDF variances for toxic pollutants covered by categorical pretreatment standards. *National Association of Metal Finishers* v. *EPA*, 719 F.2d 624, 646 (3d Cir. 1983).

In response to the court of appeals' decision, EPA issued a technical amendment to the general pretreatment regulations providing that an FDF variance would not be available for toxic pollutants. 49 Fed. Reg. 5131 (1984). The Agency announced, however, that in the absence of the FDF variance procedure it would entertain petitions for amended rulemaking by indirect dischargers who were previously eligible for FDF variances. In pretreatment standards promulgated after the Third Circuit's decision, the Agency explained that in such cases "it may be appropriate to issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate." 48 Fed. Reg. 52396 (1983).

Subsequently, in *CMA*, this Court reversed the court of appeals' decision, accepting EPA's construction of Section 301(*l*) of the Clean Water Act that FDF variances are not prohibited for toxic pollutants.

5. Prior to this Court's decision in *CMA*, Modine initiated this case in the United States Court of Appeals for the Third Circuit to challenge the metal finishing pretreatment standards. In its initial brief, Modine argued that EPA failed to consider Modine's unique situation during the metal finishing rulemaking; that EPA relied on the existence of the FDF variance provision to cure such failure; and that the Third Circuit's remand and EPA's subsequent withdrawal of the FDF variance for toxic pollutants thereby rendered the metal finishing pretreatment standards invalid as to Modine. In response, EPA explained that during the metal finishing rulemaking, the Agency had carefully considered Modine's comments and that

Modine had never established that it was in any way unique or fundamentally different from other metal finishers; that the Agency did not rely on the FDF variance procedure in making the metal finishing standards applicable to Modine's facilities since Modine had never established that those facilities were in any way unique; and that the Agency's repeal of the FDF variance provision did not preclude Modine from obtaining administrative relief by petitioning the Agency under the Administrative Procedure Act (5 U.S.C. 553(e)) to initiate rulemaking to amend the standards on the ground that its facilities were fundamentally different.

Subsequent to this Court's decision in *CMA*, Modine filed a supplemental brief requesting the Third Circuit to declare the metal finishing standards invalid until such time as a variance provision was reinstated and to remand the standards to the Agency for extension of the compliance deadline to reflect the period during which the FDF variance procedure was unavailable. In response, EPA pointed out that this Court's decision in *CMA* did not hold or even imply that the metal finishing standards or the many other pretreatment standards promulgated by EPA were invalid due to the temporary unavailability of the FDF procedure for those standards and that Modine's proper recourse for an extension of the compliance deadline was to petition the Agency. EPA noted that its decision on any such petition would be separately subject to judicial review.

The parties presented oral argument to the Third Circuit on May 14, 1985. On May 17, 1985, the court denied Modine's petition for review without opinion (Pet. App. A1).

On September 25, 1985, EPA amended the general pretreatment regulations by removing the prohibition on the granting of FDF variances for toxic pollutants. 50 Fed. Reg. 38809. In that notice, the Agency acknowledged that facilities covered by the metal finishing pretreatment

standards had the 180-day application period for FDF variances cut short by the Third Circuit's decision. Because 22 days of their period to apply for an FDF variance had elapsed prior to that decision, the Agency provided that metal finishers could submit FDF variance requests for toxic pollutants within 158 days after the notice. 50 Fed. Reg. 38810 (1985).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner argues (Pet. 7-8) that the metal finishing pretreatment standards are invalid by virtue of this Court's decision in *CMA*, as well as its decisions in *E.I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112 (1977), and *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64 (1980). Petitioner complains that it was improperly denied an FDF variance from the standards. This argument plainly lacks merit. Petitioner had an opportunity to apply for an FDF variance prior to the Third Circuit's decision. After that decision, petitioner could, and did, petition the Agency for a modification of the standards as they applied to its facilities, a procedure functionally similar to an FDF variance. And facilities governed by the metal finishing pretreatment standards now have additional time to apply for FDF variances for toxic substances. Thus, the temporary unavailability of such variances provides no basis for attacking the pretreatment standards.

a. The decisions of this Court in *duPont* and *National Crushed Stone* concluded that it was necessary that "some allowance [be] made for variations in individual plants" when EPA promulgated BPT effluent limitations guidelines for classes and categories of facilities. *duPont*, 430 U.S. at 128; see also *National Crushed Stone Ass'n*, 449

U.S. at 72. However, the Court did not require that EPA specifically adopt the FDF variance procedure. Similarly, in *CMA,* the Court did not require EPA to include the FDF variance mechanism in pretreatment standards. It merely accepted as permissible EPA's construction that Section 301(*l*) of the Clean Water Act, 33 U.S.C. 1311(*l*), does not prohibit FDF variances for toxic pollutants covered by national regulations. The Court also did not invalidate any previously adopted categorical pretreatment standards for which the FDF variance was temporarily unavailable.[3]

b. Following the Third Circuit's decision in *National Association of Metal Finishers,* the Agency temporarily made FDF variances unavailable for toxic pollutants regulated by pretreatment standards. As previously noted, however, the Agency announced that it would entertain petitions for amended rulemaking by indirect dischargers that were previously eligible for FDF variances. This Court in *CMA* acknowledged that such a procedure was equivalent to the FDF variance procedure. Slip op. 29 n.22. Thus, although the metal finishing pretreatment standards temporarily did not include provision for modification through the FDF variance procedure, a functionally comparable modification procedure was provided.

Petitioner, in fact, availed itself of this procedure on June 29, 1984, by filing a petition for rulemaking with the Agency requesting separate, less stringent pretreatment standards for two of its metal finishing facilities. The Agency denied this petition on November 15, 1984, and judicial review of that denial was not sought.

c. Finally, petitioner in its challenge to the metal finishing standards in the court below raised the same issues that it presumably would raise in seeking an FDF

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[3] Similarly, the Third Circuit had upheld the electroplating pretreatment standards in their entirety and had struck down only portions of the general pretreatment regulations. See 4-5, *supra.*

variance. The FDF variance provides a regulatory mechanism to allow a discharger to show how it is fundamentally different from other dischargers subject to the same standard. The primary basis of petitioner's challenge to the metal finishing pretreatment standards was that the Agency acted in an arbitrary and capricious manner because it did not create a separate subcategory for petitioner's facilities. As EPA pointed out, however, the metal finishing rulemaking record demonstrates that petitioner failed to establish that it was fundamentally different with respect to any factor that would have justified the creation of a separate subcategory. The court of appeals, after reviewing the metal finishing rulemaking record, rejected petitioner's contention that it had established any fundamental difference justifying a separate subcategory for its facilities. Therefore, there is no evidence to substantiate petitioner's claim that its facilities would be entitled to an FDF variance.

2. Petitioner argues (Pet. 8-9) that the court of appeals' decision not to require EPA to extend the compliance deadline for the metal finishing pretreatment standards renders this Court's decisions in *CMA* and *duPont* meaningless (Pet. 8-9). As discussed above, even the temporary unavailability of the FDF variance did not deny petitioner the opportunity to seek modification of the metal finishing pretreatment standards. Furthermore, an application for a variance or modification of an applicable pretreatment standard does not, and should not, act to shield the applicant from compliance with the applicable pretreatment standard. Finally, any request for an extension of a compliance deadline should first be submitted for consideration by the Agency.

a. The court of appeals rejected petitioner's challenge to the metal finishing pretreatment standards. The metal finishing standards have been effective since August 29, 1983. Therefore, petitioner as well as all other metal finishing facilities will have had two and one-half years to

come into compliance with the metal finishing standards by the February 15, 1986, compliance deadline. These facilities also currently are required to be in compliance with the electroplating pretreatment standards.

Petitioner is the only party that has challenged the standards or sought a delay in the compliance deadline. Since the standards apply to approximately 7,500 metal finishers, there is every indication that the vast majority of metal finishers will be in compliance with the metal finishing standards by February 15, 1986. Petitioner's request that the court of appeals "remand the metal finishing regulations to the Agency for revision of the compliance deadline" (Supp. Br. 4) was properly denied by the court of appeals. The metal finishing pretreatment standards are valid, and petitioner presented no evidence to support an order directing the Agency to extend the compliance deadline.

b. The pendency of an application for a variance is not a justification for failure to comply with a compliance deadline. It is a well established principle in environmental law that requests for variances and appeals from those decisions are "on the polluter's time."[4] *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975). The ultimate responsibility for compliance with the applicable deadline is the discharger's. Applying for a variance from an applicable standard does not alter the fact that the standards "remain in effect, and the polluter's failure to comply may subject him to a variety of enforce-

[4]The Administrator of EPA relied upon this principle in denying a request by petitioner that he stay the applicability of the metal finishing pretreatment standards pending a review by the court of appeals of petitioner's challenge to those standards. While finding that petitioner offered no justification for a stay, the Administrator also noted that "challenges by industry must be resolved on the discharger's own time." Petitioner did not challenge this November 15, 1984, decision by the Administrator.

ment procedures." *Ibid.;* see also *Natural Resources Defense Council, Inc.* v. *EPA,* 656 F.2d 768, 780-781 (D.C. Cir. 1981).

c. As EPA indicated before the court of appeals, if petitioner can establish that it needs an extension of the compliance deadline for any of its facilities, its proper recourse is to petition the Agency for an extension of the deadline. EPA Supp. Br. 4. In any such petition, petitioner could attempt to make the showing, which it thus far has failed to do, that any particular facility is entitled to an extension of the compliance deadline. The Agency's decision on any such petition would be subject to judicial review.

Industry petitioners followed this procedure in seeking to have the Agency extend the 1984 compliance deadline for the electroplating pretreatment standards. The Administrator denied the request, and the court of appeals upheld the Administrator's action. *General Motors Corp.* v. *EPA,* 738 F.2d 97 (3d Cir. 1984). In the present case, where no such request was made to the Agency, the court of appeals properly rejected petitioner's request that an extension of the compliance deadline be granted for all metal finishers. Petitioner's proper avenue for relief lies with the Agency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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